DOCKET

{SHOW } PROCEEDINGS AND ORDERS DATE: 050385

CASE NBR 84-1-05843 CSY
SHORT TITLE Patterson, Wardell DOCKETED: Dec 3 1984
VERSUS South Carolina

Date	Proceedings and Orders
Dec 3 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Dec 22 1984	Brief of respondent South Carolina in opposition filed.
Dec 27 1984	DISTRIBUTED. January 18, 1985
Feb 1 1985	REDISTRIBUTED. February 15, 1985
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Feb 22 1985	Record requested (TM)
Mar 7 1985	Record filed.
Mar 7 1985	Certified original record, 4 volumes, received.
Mar 11 1985	REDISTRIBUTED. March 15, 1985
Mar 18 1985	REDISTRIBUTED. March 22, 1985
Mar 25 1985	REDISTRIBUTED. March 29, 1985
Apr 5 1985	REDISTRIBUTED. April 12, 1985
Apr 15 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 050385

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Date	Proceedings and Orders
Apr 15 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

84-5843 (2)

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-_____

WARDELL PATTERSON, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Wardell Patterson, Jr., respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto.

Presented herewith is a petition for writ of certiorari of the moving party.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
1711 Pickens Street
Columbia, SC 29201

Counsel for Petitioner.

November 30, 1984.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-_____

WARDELL PATTERSON, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF WARDELL PATTERSON, JR.

IN SUPPORT OF MOTION TO

PROCEED IN FORMA PAUPERIS

I, Wardell Patterson, Jr., being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? NO

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. August 14, 1980 $800.00/mo

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2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

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3. Do you own any cash or checking or savings account? NO

   a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

   a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. N/A

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Wardell Patterson Jr
WARDELL PATTERSON, JR.

SWORN to and subscribed before me
this 14th day of November 1984.

Thomas Ohs (L.S.)
Notary Public for South Carolina
My Commission Expires: 4/26/89.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-_____

WARDELL PATTERSON, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

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Attorney at Law

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(803) 779-8080

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I.

DOES LOCKETT V. OHIO REQUIRE CONSIDERATION OF COMPETENT EVIDENCE REGARDING A CAPITAL DEFENDANT'S RECORD OF PRIOR GOOD CONDUCT AND LIKELY FUTURE GOOD CONDUCT IN PRISON, WHEN SUCH EVIDENCE IS OFFERED AS A BASIS FOR A SENTENCE OF LESS THAN DEATH?

II.

MAY THE ERRONEOUS EXCLUSION OF ENTIRE CATEGORIES OF RELEVANT MITIGATING EVIDENCE IN VIOLATION OF LOCKETT EVER BE DISREGARDED AS HARMLESS?

III.

IF SO, WHAT IS THE CONSTITUTIONALLY-REQUIRED STANDARD FOR ASSESSING THE HARMLESSNESS OF SUCH LOCKETT VIOLATIONS?

IV.

WERE THE LOCKETT VIOLATIONS IN THIS CASE HARMLESS?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-____

WARDELL PATTERSON, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Wardell Patterson, Jr. prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is as yet unreported. The slip opinion, State v. Patterson, Opinion No. 22168 (S.C., October 10, 1984), is reproduced in the Appendix to this petition at A-12 to A-17. The per curiam order of the Supreme Court of South Carolina dated October 30, 1984, denying petitioner's timely petition for rehearing is unreported, and is reproduced infra at A-22.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on October 10, 1984. A timely petition for rehearing was denied on October 30, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides in pertinent part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

2. This case also involves S.C. Code §§16-3-20 et seq. (1983 Cum. Supp), which statutory provisions are set forth in the Appendix to this petition at A-1 to A-4.

STATEMENT OF THE CASE

1. Summary

The petitioner in this case was convicted of murder and armed robbery. At his sentencing hearing before the trial jury, he proffered the testimony of three prison officials to the effect that he had established a record as a model prison inmate during the nearly three years since his arrest. In addition, he proffered a psychiatric evaluation which indicated a good probability that he would make a satisfactory adjustment to prison if he was sentenced to life imprisonment, and that individuals with petitioner's psychological profile generally became less likely to commit acts of violence with the passage of time. Both the prison officials' testimony and the psychological evaluation were excluded from evidence by the trial judge. In ruling to exclude the evidence, the trial judge applied South Carolina precedent to the effect that the adaptability of a capital defendant to prison was irrelevant to the jury's concerns in passing sentence. State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982). Petitioner was permitted to call as mitigation witnesses several family members and friends, and a former employer. However, none of the witnesses were able to testify concerning petitioner's conduct during the nearly three years since the crime, and their testimony was attacked by the prosecution as biased and fragmentary.

Petitioner was sentenced to death. On appeal, the South Carolina Supreme Court upheld the exclusion of the psychiatric evaluation, but found that the prison officials testimony should have been admitted because it bore on an aspect of petitioner's character. However, the state court affirmed petitioner's death sentence because other evidence of petitioner's character--the testimony of his relatives, friends and former employer--was admitted, and that for this reason the evidence of his prison record and psychiatric evaluation would have been "cumulative."

2. Procedural history

The petitioner Wardell Patterson, Jr. was arrested on August 18, 1980, and charged with the armed robbery and murder of a convenience store clerk in Tega Cay, South Carolina. He pled guilty as charged in state court, and was sentenced to death. On appeal to the South Carolina Supreme Court, petitioner's death sentence was vacated due to the trial court's failure to comply with South Carolina's statutory death penalty sentencing procedure. The state Supreme Court also held that petitioner's guilty plea had been involuntarily entered, and remanded his case for a new trial. State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982).

Petitioner's retrial began on June 13, 1983, nearly three years after the robbery and murder. After a five-day trial, petitioner was found guilty of murder and armed robbery. In accordance with S.C. Code §16-3-2) et seq. (1983 Cum. Supp.), a sentencing hearing was conducted for the purpose of determining whether he should be sentenced to life imprisonment or to death.[1] At this hearing, the state introduced no additional evidence in aggravation of petitioner's punishment, but relied entirely on the evidence of the murder and armed robbery which the state

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[1] The South Carolina statutory death penalty sentencing procedures under which this hearing was conducted, S.C. Code §§16-3-20 et seq. (1983 Cum. Supp.) are closely patterned after the Georgia statute considered in Gregg v. Georgia, 428 U.S. 153 (1976). The entire statutory scheme is set forth in the Appendix to this petition at A-1 to A-4.

had introduced at the guilt-or-innocence phase of the trial.[2]

3. Why petitioner's mitigation evidence was excluded.

In mitigation of his punishment, petitioner attempted to introduce evidence tending to show, inter alia, that he had accumulated an exemplary prison record during the more than two-and-a-half years which had elapsed between his original trial and his retrial. Tr. 1140-1141, 1143, 1443. He also offered testimony from a psychiatrist who had examined petitioner, and who was prepared to testify that individuals exhibiting a personality pattern similar to petitioner's "usually make a satisfactory adjustment to prison life," and that the likelihood of violence by such persons "diminishes with the passing of time." Tr. 1442. The trial judge excluded petitioner's psychiatric evidence on the authority of State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), in which the South Carolina Supreme Court had upheld the exclusion of a similar favorable psychiatric prediction in the following discussion:

> Appellant next alleges that the trial court erred by excluding certain psychiatric evidence concerning his future adaptability to jail. We disagree. The penalty phase of a capital murder trial is concerned with the existence or nonexistence of mitigating or aggravating circumstances, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. In Lockett v. Ohio, cited as controlling in Eddings v. Oklahoma, the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant.

298 S.E.2d at 774. The trial judge also ruled that petitioner's evidence of his good prison record was "in the same category" as the psychiatric evidence concerning his future good conduct in prison, and was therefore inadmissible. Tr. 1141.

The excluded evidence of petitioner's prison record was

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[2]The prosecution did attempt to introduce petitioner's prior criminal record, which consisted of two convictions for nonviolent property offenses. However, this evidence was excluded by the trial judge. Tr. 1144-1149.

summarized for the trial judge by an affidavit by one of petitioner's proposed witnesses, a correctional supervisor in South Carolina's Central Correctional Institution:

> I have worked in [Cellblock]-2 during Wardell Patterson's entire stay here and have observed his actions on many occasions. I have noted Mr. Patterson to be well adapted to prison life. I have observed no violence or temper outbursts from him. And I have experienced Mr. Patterson to behave in a cooperative and reserved manner, not appearing to have a negative influence on other inmates, and not appearing to pose a threat of injury to other inmates or to correctional personnel.

Defendant's Exhibit for Identification No. 4, Affidavit of William M. Bowman, Jr., Tr. 1443. In addition, defense counsel advised the court that appellant wished to present the testimony of two other correctional officers, James Smith and Larry Carter, and that their testimony would have been "that this Defendant was a model inmate while at the prison, while at the Department of Corrections," over a period of at least the previous two years. Tr. 1150-1151. It was this evidence which the trial judge excluded as irrelevant under State v. Koon.

4. What the jury was permitted to consider.

Following these rulings of the trial judge excluding all evidence and testimony concerning petitioner's past and probable future good conduct in prison, petitioner was permitted to introduce certain other mitigating evidence concerning his character. The witnesses who were permitted to testify concerning petitioner's character were these:

(1) petitioner's father, Wardell Patterson, Sr., who stated that petitioner had been a good child and that there was still some good in him, Tr. 1175-1187;

(2) petitioner's sister, Yvonne Patterson, who testified that petitioner had not been mean as a child and that she loved him, Tr. 1187-1193;

(3) a neighbor, Roberta Land, who stated that at the age of ten or eleven petitioner had behaved himself when he visited with her son, Tr. 1193-1196;

(4) a minister who visited with petitioner's family when petitioner was about ten years old, Tr. 1196-1198;

(5) petitioner's grandfather, Vernon Burns, who saw petitioner once or twice a year while he was growing up and described him as obedient and artistically talented, Tr. 1212-1218; and

(6) Maria Corley, a restaurant manager for whom petitioner had been employed for a period of about five months immediately prior to the murder in 1980, who described him as an excellent worker during that period of time. Tr. 1218-1227.

In addition, petitioner introduced certain school records which tended to show that he had a very low IQ and suffered from a learning disability. Tr. 1198-1212. However, due to the trial judge's previous ruling, the jury heard no evidence whatever concerning the period of petitioner's life from his arrest on August 18, 1980, to his retrial in June, 1983, and none of the witnesses who did testify on his behalf gave any indication that they had had any contact with petitioner in the nearly three years following his arrest.

In his summation to the jury, the prosecutor stressed that most of petitioner's witnesses were family members who had testified only about petitioner's character in the remote past, when he was a young child.

> And what is their mitigating evidence[?] They came in here, and I apologize to Mr. Patterson, but I just, watching what he's saying, you know, any father. He was good when he was about ten, a nice kid. . . And then Mr. Burns. He saw him one week or two weeks a summer, you know. Didn't know a thing about him. Do you think? Put up Ms. Land. Said he spent the night over there with my child and he was nice enough. Now when's the last time he spent the night with your child? 1970. Ladies and gentlemen, he was ten years old. And this is what they have put up for your consideration? They don't have anything. Put up Reverend Strong. He's a friend of mine. A good friend of mine. He went to the family in 1970. He said maybe the late '60's, but we'll say 1970. he knows that Defendant when he was ten years old. And that's what they bring you. Look at all the witnesses they put up.

Tr. 1253-1254. The prosecutor reminded the jury that petitioner's employer, Mrs. Corley, had only known petitioner on the job and for about five months, and asked, "what does she know?" He continued:

> And then they bring his sister in here. Of course, what she's gone [sic] say? What's Mr. Patterson gone say? And what did you think when she said, he is a wonderful person. A wonderful person. The son and this is a brother. Of course, they're gonna try to do anything they can for him and you know that. But what did they put on that stand at all to mitigate? When he was ten years old? He had a low IQ? They say, well, you shouldn't give him the death penalty. . . . I ask you to look at the totality of this whole situation. Tr. 1254.

5. How the South Carolina Supreme Court disposed of the Lockett violations in this case.

The jury voted to impose a sentence of death, and petitioner appealed to the South Carolina Supreme Court. During the pendency of his appeal, the state supreme court modified its prior holding in State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), by ruling that a capital defendant's past record of good behavior in prison is admissible in mitigation of his punishment because it is "clearly an aspect of his character" within the meaning of Lockett v. Ohio, 438 U.S. 586 (1978). State v. Koon, Opinion No. 22075 (S.C., April 3, 1984) (Koon II). The state court continued, however, to adhere to its holding in Koon I that evidence concerning a defendant's future good conduct in prison was inadmissible because "it does not bear on [his] character, prior record, or the circumstances of his offense," id. Prior to filing his brief, petitioner requested leave to argue that this holding of Koon I should be be reconsidered and overruled as violative of the Eighth Amendment principles enunciated in Lockett v. Ohio, supra. This request was denied.[3]

In deciding petitioner's appeal of his death sentence, the state supreme court applied its holding in Koon II to rule that the trial judge had erred in excluding petitioner's evidence of his good conduct in prison. The state court acknowledged that the excluded testimony incidentally tended to show petitioner's "future adaptability" to prison life, a subject which it continued to regard as irrelevant. State v. Koon, Opinion No. 22075 (S.C., April 3, 1984), and see State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627, cert. denied, ___ U.S. ___, 104 S.Ct. 3560 (1984). But since the prison officials' testimony would have included

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[3]Petitioner's motion for leave to argue against State v. Koon is reprinted in the Appendix to this petition at A-7 (see ¶3). By denying this motion, infra, A-11, the South Carolina Supreme Court precluded petitioner from raising his Lockett claim with respect to the psychiatric testimony on direct appeal. S.C. Code, Rules of the South Carolina Supreme Court, Rule 8, §10 (1976).

petitioner's past behavior, the court said, this testimony "would have therefore been admissible to show [his] character." State v. Patterson, Opinion No. 22168, (S.C., Oct. 10, 1984), infra at A-15 to A-16.

However, the court concluded that the evidence of petitioner's prison record was cumulative to the other evidence of his character which was admitted. In reaching this conclusion, the court cited the testimony of petitioner's relatives, family minister and neighbor, and added that his employer, Maria Corley, whom it characterized as a "relatively unbiased" witness, had stated that she would be willing to rehire petitioner in the future. In view of this evidence of petitioner's good character, the court held that "any error in the exclusion of the proffered testimony from prison guards and a psychiatrist was harmless beyond a reasonable doubt." Id., A-16.

In a timely petition for rehearing, petitioner pointed out the limited basis of Mrs. Corley's knowledge of his character, and drew attention to the solicitor's jury argument on this point. In addition, petitioner pointed out that the erroneously-excluded evidence of his good behavior in prison over the two-and-a-half year period prior to his retrial bore on his record as well as his character, as those terms are employed in Lockett v. Ohio, 438 U.S. 586 (1978), and that no other evidence concerning petitioner's record since the crime was considered by the sentencing jury. Finally, petitioner asserted that the state supreme court had failed to apply the constitutionally-required standard for assessing the effect of constitutional error on the validity of a conviction or sentence. Chapman v. California, 386 U.S. 18 (1967). State v. Patterson, Petition for Rehearing, infra at A-18 to A-19.

The petition for rehearing was denied without opinion on October 30, 1984. Infra, A-22. On the same date, the state supreme court granted a stay of execution for a period of sixty days in order to permit filing of this petition for a writ of certiorari. Infra, A-23.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

At trial, petitioner made a timely proffer of the testimony of both the prison officials and the psychiatrist at issue here, and objected on federal constitutional grounds to the trial court's exclusion of the evidence, citing this Court's decisions in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). Tr. 1140-1143, 1150-1151, 1442-1443. On appeal, petitioner asserted by exception and by way of a petition to argue against the South Carolina Supreme Court's prior decision in State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982) that the exclusion of his psychiatric testimony violated the Eighth Amendment principle of Lockett.[4] He was precluded from pursuing this argument further by the state supreme court's denial of his petition to argue against State v. Koon. See infra, A-7, A-11. With respect to the exclusion of his past prison record, petitioner argued on appeal that the trial court's refusal to admit this evidence violated the Eighth Amendment as construed in Lockett and Eddings, and that the error could not be disregarded as harmless under Chapman v. California, 386 U.S. 18 (1967). State v. Patterson, Brief of Appellant at 33, Reply Brief of Appellant at 7-8. As noted above, petitioner also pressed his Lockett and Chapman arguments in a timely petition for rehearing in the South Carolina Supreme Court, which petition is reproduced infra at A-18 to A-20.

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[4]Petitioner's exception on this point was the following:

> The trial judge violated S.C. Code §16-3-20(C) and the Eighth and Fourteenth Amendments by refusing to permit appellant to introduce in mitigation of his punishment testimony of a psychiatrist, Dr. Harold C. Morgan, to the effect that appellant was the type of person who could be expected to make a satisfactory adjustment to prison life. The exclusion of this testimony was error because it violated appellant's constitutional right to present to the sentencing jury any relevant evidence tending to show why he should receive a sentence of less than death.

Exception 6, Tr. 1454.

WHY THE WRIT SHOULD BE GRANTED

THIS CASE, LIKE KOON V. SOUTH CAROLINA, PRESENTS THE QUESTION OF WHETHER, AND UNDER WHAT CIRCUMSTANCES, A DEATH SENTENCE MAY BE CARRIED OUT DESPITE ITS HAVING BEEN IMPOSED BY A JURY WHICH WAS NOT PERMITTED TO CONSIDER RELEVANT EVIDENCE IN MITIGATION.

1. The exclusion of both petitioner's prison record and his psychiatric evidence unquestionably violated the Eighth Amendment principle of Lockett v. Ohio.

In Lockett v. Ohio, 438 U.S. 586 (1978), a plurality of the Court held that

> the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id., supra at 604 (emphasis in original); Eddings v. Oklahoma, 455 U.S. 104 (1982). It is manifest that two substantial violations of this Eighth Amendment principle occurred at petitioner's sentencing hearing. The first of these, as the South Carolina Supreme Court implicitly recognised, was the exclusion of petitioner's entire prison record as a "model prisoner" during the nearly three years between his arrest and his retrial. For a jury charged with deciding whether a particular defendant should be executed or committed to prison for life, the relevance of his actual conduct in prison over the years immediately preceding his sentencing hearing is self-evident, both for the light which this conduct sheds on his character, and for the bearing which the defendant's prison record may have on the likelihood of his committing violent or unlawful acts in the future. See, gen., Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383 (1983), California v. Ramos, ___ U.S. ___, 103 S.Ct. 3446 (1983), Jurek v. Texas, 428 U.S. 262 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

The second violation of Lockett occurred in the exclusion of a psychiatric evaluation of petitioner which tended to establish that he could be expected to make a satisfactory adjustment

to a prison environment and would likely pose a small and diminishing risk of further acts of violence. That such psychiatric prediction evidence plays an important role in capital sentencing decisions has been frequently recognized in this Court's cases. Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383 (1983), Estelle v. Smith, 451 U.S. 454 (1981); and see Eddings v. Oklahoma, 455 U.S. 104, 121 (1982) (Burger, C.J., dissenting). As the Court has emphasized, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell and Stevens, JJ.). South Carolina law permits psychiatric predictions of capital defendants' likely future dangerousness, State v. Woomer, 278 S.C. 468, 299 S.E.2d 417 (1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3572 (1983): its rejection of psychiatric predictions of a capital defendant's probable nondangerousness in a prison environment is based not on any concern for the reliability of such predictions, cf. Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 3408-3417 (1983) (Blackmun, J., dissenting), People v. Murtishaw, 29 Cal.3d 733, 175 Cal. Rptr. 738, 631 P.2d 446 (1982), but rather on its view that a convicted murderer's likely good conduct in prison is itself irrelevant to the jury's sentencing decision. State v. Koon, 278 S.C. 528, 298 S.E.2d 769, 773-774 (1982), State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627, cert. denied, ___ U.S. ___, 104 S.Ct. 3560 (1984), State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13, 1984). The South Carolina Supreme Court has reached this position on the basis of its reasoning that a capital sentencing jury is concerned with the characteristics of the defendant only "as they bear logical relevance to the crime" for which he has been convicted. Koon I, supra. According to the South Carolina court, a capital defendant's potential for a successful adjustment to life in prison is irrelevant to the determination of his sentence because of "the lack of logical connection between adaptability to confinement and the specific personality or

character traits which were instrumental in leading the defendant to commit the particular crime at issue." State v. Plath, supra, 313 S.E.2d at 627.

What the South Carolina Supreme Court's unduly narrow and crime-focused view of relevancy overlooks, of course, is the possibility that a sentencing jury's perception of whether a convicted murderer would pose an unreasonable risk of further acts of violence if permitted to live in prison might influence its decision to take or spare his life. A convicted murderer's probable future conduct is an entirely proper consideration in any sentencing decision, California v. Ramos, ___ U.S. ___, 103 S.Ct 3446 (1983), and where the jury's choice is between death and life imprisonment, the likelihood of that a particular defendant would prove co-operative and nonviolent in a prison environment is especially germane. Thus the South Carolina Supreme Court's prohibition of such evidence--at least where the evidence is favorable to the defendant, cf. State v. Woomer, supra--cannot be reconciled with the command of the Eighth Amendment that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 262, 271 (1976) (opinion of Stewart, Powell and Stevens, JJ.), and see, California v. Ramos, supra, 103 S.Ct at 3453-3454. Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 3396 (1983). In sum, it is obvious that South Carolina's prohibition of psychiatric testimony concerning a capital defendant's probable good conduct in prison violates the Eighth Amendment holdings of this Court. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

2. Assessing the effect of Lockett error.

While the Court has plainly delineated the substantive constitutional principles which were violated at petitioner's sentencing hearing, it has not had occasion to consider a claim that a state court's violation of these principles constituted

"harmless error."[5] The present case, then, raises two important and unresolved constitutional questions concerning the administration of the death penalty: can the erroneous exclusion of relevant mitigating evidence ever be disregarded as "harmless error," and if so, by what criteria must the "harmlessness" of such constitutional error be assessed?

In Chapman v. California, 386 U.S. 18 (1967), the Court held that, with certain exceptions, constitutional error could be disregarded as harmless so long as the state, as beneficiary of the error, was able "to prove beyond a reasonable doubt that the error complained did not contribute to the verdict obtained." 386 U.S. at 24. However, the Court cautioned that this federal harmless constitutional error rule would not permit courts "to treat as harmless those constitutional errors that 'affect' substantial rights' of a party," id. at 23, quoting Fahy v. Connecticut, 375 U.S. 85 (1963). And shortly after Chapman, the Court again stressed that "[w]e do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error." Harrington v. California, 395 U.S. 250, 254 (1969).

As an initial matter, it is plain that the importance of the objectives which the rule of Lockett v. Ohio seeks to safeguard requires that no lesser standard than that of Chapman v. California be applied to assess whether actual Lockett violations may be disregarded as harmless. As this Court has held on many occasions since Gregg v. Georgia, 428 U.S. 153 (1976), the severity and

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[5]In Lockett v. Ohio, 438 U.S. 586 (1978), the statutory capital sentencing scheme expressly precluded consideration of all but a handful of possible mitigating circumstances, including all of those proffered by Lockett herself, and the Court thus held the statute unconstitutional and reversed without an explicit consideration of prejudice. Later, in Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court was faced with a death sentence which had been imposed under a facially constitutional statute, but which appeared to have been imposed by a judge who erroneously believed himself to be precluded from considering the youthful defendant's turbulent childhood as a mitigating circumstance. The Court again reversed, instructing the state courts on remand to "consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances," and noting that "[w]e do not weigh the evidence for them." 455 U.S. at 117.

irrevocability of death as punishment creates a special need for particular reliability in the decision to impose a death sentence in a particular case, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, JJ.), and renders unconstitutional any procedure which creates an unnecessary risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Given the gravity of the sentencing decision and the "vital importance to the defendant and to the community" that capital sentencing decisions "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 356, 358 (1977), it is plain that any standard of appellate review less demanding than that prescribed by Chapman will be inadequate to the task of "ensur[ing] that the death penalty was not erroneously imposed" as a consequence of constitutional error. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). See Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2751 (1983) (White, J., concurring) (suggesting applicability of "harmless error rule" to determine whether death verdict might have been affected by jury's consideration of unconstitutional aggravating factor).

The question, then, reduces itself to whether and how the Chapman harmless error test may be applied to violations of Lockett. In answering this question, it is essential to keep in mind the fundamental difference between the nature of the jury's decision with respect to a criminal defendant's guilt or innocence and its task of determining whether or not to impose a sentence of death. Zant v. Stephens, supra, 103 S.Ct at 2754-2755 (Rehnquist, J., concurring). In any criminal trial, the jury is required to convict a defendant once it finds that the evidence has demonstrated his guilt beyond a reasonable doubt. This elementary legal principle lies at the heart of the Chapman test: since the jury is legally obligated to convict once each element of the offense charged has been proven, an examination of the record will usually reveal whether "there is a reasonable

possibility that the [constitutional error] contributed to the verdict." Schneble v. Florida, 405 U.S. 427, 432 (1972).

By contrast, under South Carolina's death penalty sentencing statutory complex, the discretionary and relatively unstructured nature of the jury's sentencing decision makes such a determination virtually impossible. No quantum of evidence may ever suffice to require a jury to impose a death sentence. Woodson v. North Carolina, 428 U.S. 280 (1976), State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). South Carolina juries are not required to state their reasons for declining to impose a sentence of death, S.C. Code §16-3-20(C) (1983 Cum. Supp.), and may impose a life sentence on the basis of any aspect of the case which it sees fit to consider. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63, 74 (1982), cert. denied, 460 U.S. 1103 (1983). Like the Georgia sentencing scheme considered in Gregg v. Georgia, 428 U.S. 153 (1976) and Zant v. Stephens, supra, South Carolina's sentencing procedure does not require the jury to balance aggravating and mitigating factors against one another, State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 629, cert. denied, ___ U.S. ___, 104 S.Ct. 3560 (1984), but consigns the ultimate sentencing decision to the jury's unfettered discretion once one or more statutory aggravating circumstances have been established. The jury's sentencing recommendation is binding upon the trial judge, State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 802, cert. denied, 444 U.S. 957 (1979), and while the sufficiency of the evidence to support a death sentence is reviewed on appeal by the state supreme court, S.C. Code §16-3-25(C) (1983 Cum. Supp.), that court does not undertake to redetermine or reweigh the factors underlying the jury's sentencing recommendation, so long as that recommendation is supported by any reasonable view of the evidence. See e.g., State v. Adams, 279 S.C. 228, 306 S.E.2d 308, cert. denied, ___ U.S. ___, 104 S.Ct. 558 (1983) ("the jury had ample opportunity to weigh all of the evidence as might relate to mitigating circumstances"); State v. Plath, supra ("the jury was disposed to and did in fact give every

beneficial consideration to which these appellants were entitled").

Thus, because the jury "is free to consider a myriad of factors to determine whether death is the appropriate punishment," California v. Ramos, ___ U.S. ___, 103 S.Ct. 3446, 3456 (1983), a reviewing court simply cannot normally discern from the trial record whether the exclusion of relevant mitigating evidence from a capital sentencing proceeding may have contributed to the jury's sentencing verdict. Other states have implicitly recognized the virtual impossibility of determining the effect of such error by reversing death sentences so infected without consideration of prejudice. See, e.g., Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 69 (1979) (exclusion of testimony of defendant's wife was reversible error even though evidence was somewhat cumulative, "because of the unlimited and undefined nature of mitigating evidence"); Romine v. State, 251 Ga. 208, 305 S.E.2d 93, 100-102 (1983); Simmons v. State, 491 So.2d 316, 320 (Fla. 1982) (exclusion of psychiatric evaluation of defendant's capacity for rehabilitation); Miller v. State, 332 So.2d 65 (Fla. 1976) (denial of continuance to permit psychiatric testimony in mitigation). While these decisions appear to rest on state law, they accurately reflect the difficulty of determining whether the jury's sentencing decision would necessarily have been the same had all relevant mitigating evidence been considered.[6]

This is not to say that any exclusion of mitigating evidence must necessarily trigger reversal under Lockett. Obviously, the federal constitution does not limit the authority of state

[6]In a different context, the Court recognized in Gardner v. Florida, 430 U.S. 356 (1977) the impossibility of making a reliable determination on appeal of whether the sentencing authority would have reached the same decision absent constitutional error in the consideration of evidence. In Gardner, the Court rejected the prosecution's suggestion that the constitutional error committed when the trial judge sentenced the defendant after considering an undisclosed presentence report could be cured by remanding the case to the state supreme court for appellate reconsideration of the death sentence after the report had been disclosed. Noting that timely disclosure in the trial court might have produced a defense explanation or argument which in turn could have led the sentencing judge to a different sentencing decision, the Court held that the constitutional error could only be cured by an entirely new sentencing determination. 430 U.S. at 362.

trial courts to exclude evidence which is truly cumulative, in the sense that it duplicates other evidence of the same kind proving the same point. Purcell Envelope Co. v. United States, 48 Ct.Cl. 66, 73 (1913); McCabe v. Saxon, 184 S.C. 158, 191 S.E. 905 (1937). Thus, for example, if the trial court had admitted the testimony of three prison guards to testify to the petitioner's good behavior while incarcerated, Lockett would not have been violated by the exclusion of the identical testimony of a fourth or a fifth such witness. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 71 (1979) (Lockett and state law do "not imply. . . that the judge, in his discretion and inherent power to control the progress of trials, cannot limit the introduction of an endless quantity of cumulative testimony . . ."); and see Brooks v. Francis, 716 F.2d 780, 791-792 (11th Cir. 1983) (no Lockett violations where mitigation witnesses eventually gave the testimony for which they were called, despite frequent objections by prosecution).

These elementary principles of trial procedure, however, have nothing to do with harmless error, for where only genuinely "cumulative" testimony is excluded, the trial court has not committed any error at all. The question presented by this case is entirely different. Here, entire categories of evidence--petitioner's good record over a lengthy incarceration, and his favorable psychiatric prognosis--were erroneously excluded. The situation here, then, is one in which "the jury was told all the reasons why the death sentence should be imposed but only some of the reasons why it should not." Smith v. Estelle, 445 F. Supp. 647, 659 (N.D. Tex. 1978), aff'd on other grounds, 451 U.S. 454 (1981). Even conceding that Lockett does not require that any particular number of witnesses be called to support each mitigating circumstance proffered by a defendant, the Eighth Amendment is unquestionably violated by the exclusion of whole classes of relevant mitigating evidence. And for the reasons outlined above, in the normal case the effect of such error is by the very nature of the capital sentencing decision impossible

to identify and assess with the certainty that Chapman v. California requires.

3. Even if the principle of Chapman v. California were generally applicable to Lockett violations, the violations in this case were manifestly prejudicial and cannot be disregarded as "harmless."

In turning to the facts of this case, it must be kept in mind that the South Carolina Supreme Court's opinion identifies only one of the Lockett violations which occurred here, while perpetuating the other. The court did recognize that the trial judge had erred in excluding the testimony of petitioner's good prison record over the several years between his arrest and his retrial. But it expressly reaffirmed its prior holdings to the effect that competent evidence of a capital defendant's prognosis for a successful and nonviolent adaptation to life in prison is "irrelevant" to the jury's sentencing decision because of "the lack of logical connection between adaptability to confinement and the specific personality traits which were instrumental in leading the defendant to commit the particular crime at issue." State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627, cert. denied, ___ U.S. ___, 104 S.Ct. 3560 (1984); State v. Koon, 278 S.C. 528, 298 S.E.2d 769, 773 (1982). This patently erroneous restriction on the scope of mitigating evidence provides half of the basis of the state supreme court's affirmance of petitioner's death sentence: the court did not claim that any other evidence of petitioner's likely future good conduct was introduced, but only that the whole subject was irrelevant and

was properly excluded. State v. Patterson, infra, A-15 to A-16.[7]

The other half of the state court's reasoning was that to the extent that petitioner's evidence of his past good behavior in prison also bore on his "character," other evidence of his good character rendered the excluded evidence cumulative and its exclusion harmless. This portion of the court's opinion is simply unsupported by the record. As the state court itself recognized, only one of the six "character" witnesses permitted to testify on petitioner's behalf was "relatively unbiased." This witness, petitioner's former employer, admitted that she had known petitioner for only five months some three years before the time of his trial, and that even then she had known him only on the basis of his conduct at work. The prosecutor effectively minimized the weight of this character evidence in his cross-examination and jury argument, and the jury was left with the false and misleading impression that petitioner had been unable to

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[7]In a decision handed down since the filing of its opinion in petitioner's appeal, the South Carolina Supreme Court has reiterated its position on this question in terms which leave no room for doubt that its prohibition of evidence concerning a defendant's likely future conduct in prison is irreconcilable with the requirements of Lockett. In State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13, 1984), the state court reiterated State v. Koon's prohibition of such testimony on the grounds that "[t]he penalty phase of a capital murder case is concerned with the existence or nonexistence of aggravating or mitigating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life." The court continued:

> From a reading of the mitigating circumstances enumerated in the Code [S.C. Code §16-3-20(b) (1983 Cum. Supp.)], it is obvious that the Legislature never intended that the judge and/or the jury gaze into the crystal ball and attempt to speculate on whether the prisoner would or would not conduct himself properly in prison.

Since, as has been noted earlier, South Carolina law does permit prosecution psychiatrists to "gaze into the crystal ball" in order to assure a sentencing jury that a capital defendant would be likely to commit further acts of violence unless executed, State v. Woomer, 278 S.C. 468, 299 S.E.2d 317, 319-320 (1982), this statement by the South Carolina Supreme Court can only mean that the future conduct of an capital defendant in a prison setting is itself irrelevant to the sentencing jury's concerns, and that consideration of such probable future conduct as a mitigating circumstance is not authorized under South Carolina law. It was under this patently unconstitutional legal principle that petitioner's pyschiatric evidence was excluded in this case.

marshal any favorable evidence or testimony concerning any aspect of his life since his arrest--an arrest which occurred on his twenty-first birthday, nearly three years before the trial.[8]

Lockett v. Ohio requires that the sentencing authority be permitted to consider any evidence in mitigation which relates to a capital defendant's "character or record." The jury in this case was deprived of any information concerning petitioner's "record" since his arrest, and of a critically important aspect of his "character"--his past and likely future adaptability to confinement. Under such circumstances, it is impossible to conclude that the jury's sentencing verdict would have necessarily been the same had all the facts been revealed at trial. The record does not and cannot exclude the possibility that petitioner's death sentence was imposed in part because the jury feared that imposition of a life sentence would provide insufficient protection to society against the impulsive violence of which petitioner had on one occasion demonstrated himself capable. Testimony from prison officials who had had daily contact with petitioner for well over two years after his crime, and a psychological evaluation which tended to show that petitioner's good behavior in prison could be expected to continue, may have gone far towards allaying such concerns. No amount of evidence from family members, friends and employers concerning his good character before the murder could take the place of such objective evidence of the likelihood that he would be nonviolent and cooperative in prison if his life was spared. Thus the possibility of prejudice from

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[8]In characterizing the excluded evidence as "cumulative," the state court appears to have departed from its own long-established definition of that term as "additional evidence of the same kind to the same point." McCabe v. Saxon, 184 S.C. 158, 191 S.E. 905, 909 (1937), quoting 20 R.C.L. 197. South Carolina recognizes that if evidence

> is of a different kind, though upon the same issue, it is not cumulative. Nor is evidence cumulative in the legal sense which, while tending to establish the same legal result, does it by proof of a new and distinct fact.

Id., Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 198 S.E. 395, 399 (1938), and see gen., 10A Words and Phrases "Cumulative Evidence," 410-411 (1968).

the exclusion of all of this evidence is manifest.

Finally, it should be noted that in purporting to determine that the exclusion of petitioner's psychiatric and prison witnesses was "harmless beyond a reasonable doubt," the state supreme court made no evaluation of the nature or weight of the evidence in aggravation presented to justify a death sentence. Even if Chapman were to be held applicable to assessing the effect of Lockett error, "it is only by assessing the weight of the evidence against the defendant that the effect of the error on the jury's verdict can be judged." Connecticut v. Johnson, 460 U.S. 73, 95 (1983) (Powell, J., dissenting). The evidence in this case consisted of proof that petitioner, accompanied by his older sister, a fifteen-year-old girl and a male companion, spontaneously decided to rob a convenience store shortly after attending petitioner's twenty-first birthday party. The state introduced no evidence to show that the murder of the clerk was premeditated. The victim died almost instantaneously, and does not appear to have been aware that he would be shot prior to the instant that the weapon discharged. Cf. Godfrey v. Georgia, 446 U.S. 420, 450 (1980) (White, J., dissenting). An eyewitness to the crime was not harmed, Tr. 1230-1251, and petitioner submitted peaceably to arrest near the crime scene. Tr. 887-889. The sole aggravating circumstance relied upon by the state was that the murder was committed while in the commission of armed robbery. Tr. 1289-1290. Petitioner had no prior record of violent crimes, Tr. 1444, was twenty-one years old, and had an IQ score which placed him at the borderline of mental retardation. Tr. 1200-1203.

In summary, there was nothing about this crime that militated for a death sentence beyond the robbery statutory aggravating circumstance itself. Accordingly, had the state court complied with the requirements of Chapman by considering the weight of the evidence against petitioner in determining whether the constitutional errors committed at trial could have affected the sentencing verdict, it would have been forced to conclude that reasonable jurors might well have differed as to the appropriate sentence

to be imposed in this case--and that the erroneous exclusion of mitigating evidence could therefore not be disregarded as harmless.

It is plain that the the South Carolina Supreme Court failed to apoly the Chapman standard to the exclusion of petitioner's mitigating evidence. The state court's opinion fails even to cite Chapman or any other case dealing with harmless constitutional error, cf. United States v. Hasting, ___ U.S. ___, 103 S.Ct. 1974, 1978 (1983), and indeed contains no acknowledgement that the erroneous exclusion of relevant mitigating evidence presents a federal constitutional issue at all. In characterizing the excluded testimony of the prison officials as "cumulative," the court appears to mean only that its exclusion was not grounds for reversal, since the record is obviously completely devoid of any similar testimony from any witness. In short, to the limited extent that the state supreme court correctly identified the Lockett errors in this case, it has treated them as if they were "mere errors of state law," Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 3428 (1983) (plurality opinion), and has effectively placed upon petitioner the burden of showing actual prejudice. State v. Smart, 278 S.C. 515, 299 S.E.2d 686, 688 (1982).

Judging by the opinion of the South Carolina Supreme Court in State v. Koon, Opinion No. 22075 (S.C., April 3, 1984), petition for cert. filed November 30, 1984), that court has adopted a practice of affirming death sentences which are marred by Lockett error without first considering or complying with the constitutional principles set forth in Chapman v. California. This practice also places South Carolina in conflict with the state supreme courts of Georgia and Florida, which have implicitly acknowledged the impossibility of attempting to gauge the effect on a sentencing jury of erroneous exclusions of mitigating evidence. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 69 (1979), Romine v. State, 251 Ga. 208, 305 S.E.2d 93, 100-102 (1983) Simmons v. State, 491 So.2d 316, 320 (Fla. 1982), Miller v. State, 332 So.2d 65 (Fla. 1976). If permitted to continue, this method of appellate

review will effectively vitiate the right of capital defendants to present relevant mitigating evidence which Lockett and Eddings guarantee. For all of these reasons, the Court should grant the writ of certiorari to consider the application of the Chapman harmless constitutional error doctrine to violations of the Eighth Amendment principle of Lockett, and should reverse the death sentence imposed in this case.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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November 30, 1984.

EDITOR'S NOTE

PAGES A-1 — A-23 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

S.C. Code §16-3-20. Punishment for murder: spearate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:
(a) Aggravating circumstances:
(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;
(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(b) Mitigating, circumstances:
(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
(5) The defendant acted under duress or under the domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(7) The age or mentality of the defendant at the time of the crime;
(8) The defendant was provoked by the victim into committing the murder;
(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant

found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

* * * * *

S.C. Code §16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:
(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(1) Affirm the sentence of death; or
(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of §16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any

evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable Robert L. McFadden, Judge

THE STATE,

RESPONDENT,

v.

WARDELL PATTERSON, JR.,

APPELLANT.

PETITION TO ARGUE FOR OVERRULING

OR MODIFICATION OF PRECEDENT

Counsel for appellant Wardell Patterson, Jr., who is appealing his conviction for murder and sentence of death, requests permission, pursuant to Supreme Court Rule 8 §10, and as required by the decision of the United States Supreme Court in Engle v. Isaac, 456 U.S. 107, 130-134 (1982), to argue for modification or overruling of the following prior decisions of this Court:

1.

State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982), State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), cert. denied, 102 S.Ct. 3098 (1982), State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982),

and State v. Spann, ___ S.C. ___, 308 S.E.2d 518 (1983), to the extent that these decisions uphold the constitutionality and legality of excluding jurors from service at either stage of a capital murder trial on the sole ground of their inability to impose a death sentence, and despite the provisions of S.C. Code §16-3-20(E) (1983 Cum. Supp.), and the Sixth Amendment's requirements of jury impartiality and representativeness. Appellant further seeks leave to argue for a modification of State v. Truesdale, supra, to the extent that this decision precludes a capital defendant from presenting evidence to support the factual allegations which form the basis of his objections to exclusion of such jurors. Grigsby v. Mabry, 637 F.2d 523 (8th Cir. 1980), on remand, 569 F. Supp. 1273 (ED Ark. 1983); Avery v. Hamilton, ___ F. Supp. ___, No. C-C-81-48 (WDNC Jan. 12, 1984).

2.

State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), cert. denied, 103 S.Ct. 1802 (1983), and State v. (Horace) Butler, 277 S.C. 452, 290 S.E.2d 1 (1982), to the extent that these decisions permit a jury at the guilt-or-innocence phase of a capital trial to be instructed that the term "reasonable doubt" means a "not a weak doubt, not a slight doubt," but a "substantial doubt," and "a doubt for which a person honestly seeking to find the truth can give a reason." Appellant seeks leave to argue that such instructions in his case violated the Due Process Clause of the Fourteenth Amendment by impermissibly lessening the the state's burden of proving each fact required for conviction

beyond a reasonable doubt, In re Winship, 397 U.S 358 (1970), and that they further violated the Eighth Amendment's requirement of special reliability in the process by which guilt and punishment are determined in a capital case. Woodson v. North Carolina, 428 U.S. 280 (1976), Beck v. Alabama, 447 U.S. 625 (1980), Butler v. South Carolina, __ U.S. ___, 103 S.Ct. 242 (1982) (Marshall, J., dissenting from denial of certiorari), Adams v. South Carolina, __ U.S. ___, 104 S.Ct. 558 (1983) (Marshall and Brennan, JJ., dissenting from denial of certiorari).

3.

State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), to the extent that this decision upholds against Eighth Amendment challenge the exclusion of competent psychiatric testimony to the effect that a particular capital defendant on trial was the type of person who could be rehabilitated to prison life. Appellant seeks leave to argue that such evidence has logical relevance to the question of whether he should have been sentenced to life imprisonment or to death, and that the exclusion of such evidence at his trial violated the Eighth Amendment principles of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

4.

State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), and State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), cert. denied, 103 S.Ct. 1802 (1983), extent that these decisions hold that

the sentencing authority in a capital case need not be instructed to apply the reasonable doubt standard, nor any other standard of proof, to the ultimate determination that death is the appropriate sentence in a particular case. Appellant seeks leave to argue that the trial judge's denial of such an instruction in his case violated the Eighth Amendment's requirements of special reliability and reasonable consistency in the procedures by which death is imposed as punishment. Woodson v. North Carolina, 428 U.S. 280 (1976).

5.

State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), cert. denied, 103 S.Ct. 1802 (1983), and State v. Spann, ___ S.C. ___, 308 S.E.2d 518 (1983), to the extent that these decisions uphold jury instructions to the effect that a sentencing recommendation for life imprisonment must be unanimous, and further uphold the refusal of the trial judge to instruct the jury as to the actual legal consequences of a failure to reach unanimous agreement on the question of sentence. Appellant seeks leave to argue that this concealment from the jury of legally accurate information pertaining to its sentencing decision violates the Eighth Amendment by arbitrarily removing a critical safeguard against the risk that members of the jury would be pressured by fellow jurors into voting for the death penalty out of a misplaced fear of forcing a retrial on the issue of punishment. Cf. California v. Ramos, __ U.S. ___, 103 S.Ct.3446 (1983).

6.

State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981) and State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), cert. denied, 103 S.Ct. 1802 (1983), to the extent that these decisions uphold the refusal of the trial judge to enumerate or specify, either orally or in writing, any nonstatutory mitigating circumstances actually supported by the evidence. Appellant seeks leave to argue that this failure, considered together with the trial judge's enumeration of statutory mitigating circumstances and in the context of the entire sentencing charge, had the effect of limiting the jury's consideration of relevant nonstatutory mitigating circumstances, in violation of the Eighth Amendment to the United States Constitution.

7.

State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) and State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981), to the extent that these decisions uphold the exclusion of competent evidence offered in mitigation of punishment at capital sentencing hearings bearing on whether the death penalty has any superior deterrent value, when compared to imprisonment, as a punishment for murder, and bearing on the actual process of electrocution which the jury is being requested to recommend. Appellant seeks leave to argue that such evidence has logical relevance to the question of whether he should have been sentenced to life imprisonment or to death, and that the exclusion of such evidence at

his trial violated the Eighth Amendment principles of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

WHEREFORE, having set forth his grounds, counsel for appellant Wardell Patterson, Jr. requests that he be permitted to argue in his brief and at oral argument for modification or overruling of the decisions enumerated above.

Respectfully submitted,

David I. Bruck
DAVID I. BRUCK
Attorney for appellant.

March 16, 1984.

The Supreme Court of South Carolina

CLYDE O. DAVIS JR.
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

March 21, 1984

David I. Bruck, Esquire
1711 Pickens Street
Columbia, SC 29201

Re: The State v. Wardell Patterson, Jr.

Dear Mr. Bruck:

This is to advise that the following Order has been endorsed on your Petition to Argue for Overruling or Modification of Precedent in the above matter:

"Petition to argue against precedent denied.

s/ Bruce Littlejohn C.J.
For the Court

March 20, 1984."

Very truly yours,

CLERK

CNO,Jr./srb

cc: Sam B. Fewell, Jr., Esquire
William Isaac Diggs, Esquire
The Honorable Harold M. Coombs, Jr.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State . . . . . Respondent,

v.

Wardell Patterson, Jr. . . . . Appellant.

Appeal from York County
Robert L. McFadden, Judge

Opinion No. 22168
Heard September 12, 1984 - Filed October 10, 1984

AFFIRMED

David I. Bruck, Columbia, S. C.; Sam B. Fewell, Jr., Rock Hill, S. C., and William Isaac Diggs, Deputy Appellate Defender, Columbia, S. C. for appellant.

T. Travis Medlock, Attorney General; Harold M. Coombs, Jr., Assistant Attorney General, Columbia, S. C.; and William L. Ferguson, Solicitor of the Sixteenth Judicial Circuit, York S. C. for Respondent.

HARWELL, A. J.: Appellant Wardell Patterson, Jr. was found guilty of murder and armed robbery by a York County jury and sentenced to death pursuant to S. C. Code Ann. §16-3-20 (1983) for murder and twenty-five years imprisonment for armed robbery. The case is before this Court pursuant to appellant's direct appeal and the mandatory review provisions of S. C. Code Ann. §16-3-25 (1983). We affirm.

On August 18, 1980 at approximately 4:20 A. M. a newspaper delivery person, Mrs. Selby, arrived at the Fast Fare convenience store parking lot at Tega Cay. She saw two black females leave the store and walk toward the road. She then heard the loud noise of a shotgun firing and observed a black male holding a shotgun in the doorway of the store. The gunman "trotted" away in the same direction the girls had taken. Without delay, Mrs. Selby saw a dark blue car without its lights burning screech off toward Charlotte, North Carolina. She entered the store and found the employee, Ted Graham, still

breathing but lying in a pool of blood with a shotgun wound one inch by two inches in the back of his skull. The appellant was arrested and indicted for murder and armed robbery.

GUILT PHASE

The appellant asserts that three alleged errors in the guilt phase of the trial justify reversal of his convictions. He first contends that the court erred in denying his motion for mistrial on the basis of the solicitor's direct examination of the police officer who took the appellant's statement. We disagree.

The appellant made a statement to police while in custody admitting that he participated in the armed robbery. When questioned about the shooting, however, he became silent. At trial, the court heard an in camera recitation of the officer's testimony regarding the statement and found that the appellant had knowingly and intelligently waived his right to remain silent and to have counsel present and had made the statement freely and voluntarily.

The officer then testified to the jury concerning the statement, including the appellant's "mute" response to questions about the murder. The appellant's counsel did not object to the testimony. The court on its own motion then initiated a request for a jury instruction. The appellant moved for a mistrial. The judge denied the motion but gave a curative charge:

> . . .[c]ertain questions were asked of Captain Ferrell, as to whether he had asked the Defendant about the shooting of the clerk in the Fast Fare Store. As to those particular questions and the answers of Captain Ferrell, those questions and Captain Ferrell's responses are not evidence in this case. They are not to be considered. You are to erase those particular questions and answers completely from your minds and they are not to be considered by you in any way nor mentioned in your deliberations in the jury room as evidence for or against the Defendant in this case.

The appellant asserts under Miranda v. Arizona, 384 U. S. 436, 468, n. 37 (1966), that the prosecution impermissibly penalized him for exercising his Fifth Amendment privilege.

We conclude that, if error, the soliciter's questioning was harmless beyond a reasonable doubt. Chapman v. California, 386 U. S. 18 (1967).

The court's jury instruction was sufficient to cure any prejudice to the appellant. State v. Campbell, 259 S. C. 339, 191 S. E. 2d 770 (1972). The appellant's two skilled trial attorneys did not notice any potential prejudice until the judge called the situation to their attention. Furthermore, the appellant's silence when questioned about the murder, in contrast to his admissions of armed robbery, coincided with his defense that he was not the triggerman. The circumstances of the case minimize the prejudicial impact of the evidence. An officer had previously testified that the appellant stated at his arrest, "I didn't shoot anybody." See State v. Smallwood, 277 Or. 503, 561 P. 2d 600 (1977), cert. denied, 434 U. S. 849; State v. Bulgh, 31 Or. App. 1155, 572 P. 2d 642 (1977).

The second alleged error in the guilt phase concerns the judge's Miranda jury charge. The appellant asserts that the judge erred in failing to advise the jury that it could not consider the appellant's statement unless it found he both understood and waived his right against self-incrimination.

The trial judge, after the in camera hearing, found that the appellant "knowingly and intelligently made the statement and knowingly and intelligently waived his Constitutional Rights to remain silent." However, since the appellant stated that he had requested a lawyer to no avail and denied making part of the statement, the judge submitted the issue to the jury. State v. Adams, 277 S. C. 115, 283 S. E. 2d 582 (1981); State v. Adams, 279 S. C. 228, 306 S. E. 2d 208 (1983). The trial judge charged the jury that the statement must have been given "freely and voluntarily". . . "under the totality of the circumstances" and that "beyond a reasonable doubt the Defendant was given and understood his rights."

We find no reversible error in the judge's failure to require the jury, before considering the statement, to find a waiver of constitutional rights. The jury could not have found that the appellant understood his rights and that the statement was given freely and voluntarily unless it believed that the appellant had waived his constitutional rights. This exception lacks merit.

The appellant next asserts error in the judge's failure to charge the law of accomplice liability for a murder

committed during a felony, citing Beck v. Alabama, 447 U. S. 625 (1980). Beck held that a jury in a capital case must be permitted to consider all lesser included non-capital offenses to the crime of capital murder when supported by the evidence.

We first note that the appellant made no request for such a charge at trial, nor did he raise the issue by exception. However, even if the matter were properly presented for our review, we find no error. South Carolina retains the common law rule of murder that the hand of one is the hand of all. State v. Hicks, 257 S. C. 279, 185 S. E. 2d 746 (1971). Guilt through accomplice liability is not a lesser included offense of murder in South Carolina.

The appellant's reliance on Enmund v. Florida, 458 U. S. 782 (1982) is also misplaced. Enmund held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty upon a defendant who did not personally take life or intend that life be taken. The evidence in the case at bar supports the inference beyond a reasonable doubt that the appellant personally killed the victim or intended to take his life. The sentencing phase was the proper setting for the appellant's argument that the proof did not conclusively establish the appellant as the triggerman and that a life rather than death sentence was appropriate.

SENTENCING PHASE

The appellant maincains that the trial court unconstitutionally restricted the jury from considering, during the sentencing phase, the possibility that the appellant did not personally kill or intend to kill the victim. This argument lacks merit. It is true that the trial judge refused to charge the statutory mitigating circumstance that "the Defendant was an accomplice in the murder committed by another person and his participation was relatively minor." However, no evidence in the record supports a reasonable inference pursuant to S. C. Code Ann. §16-3-20(C)(b)(4)(1983) that the appellant's participation in the murder was relatively minor. Furthermore, the judge's charge stated that the mitigating circumstances submitted to the jury in writing were examples only and that it could impose a life sentence for any reason at all. The refusal to charge this request was not error.

The appellant next asserts that the trial judge erred in excluding as mitigating evidence testimony of his good conduct in prison during the past two-and-a-half years. The

State contends that, since the testimony was not introduced to show the appellant's character but to show future adaptability to prison life, it was inadmissible under State v. Koon, 278 S. C. 528, 298 S. E. 2d 769 (1982). However, the testimony would have included past behavior and would have therefore been admissible to show the appellant's character. State v. Stewart, Op. No. 22163, filed September 5, 1984.

Nevertheless, we conclude that in this case the evidence was cumulative. The defense presented six witnesses who testified as to the appellant's good character. The appellant's father testified that he was an obedient child who helped with household and dairy chores. According to the father, commission of murder was out of character for the appellant, and he still has some good in him.

The appellant's sister Yvonne stated that their sister Gerlene, who was an accomplice in the murder and armed robbery, had a strong influence on Wardell and that he is still a wonderful person. Roberta Land testified that Wardell had spent several nights at her home visiting her son, that he did not appear to be mean, and that he was well-mannered. The Reverend Dr. W. T. Strong had visited the Patterson home and found the home to be Christian and the children obedient. The appellant's grandfather, a director of the Family Development Corporation in Philadelphia, testified that his sons had already planned to bring the appellant into the company.

Finally, the appellant's employer on the day he committed the crime testified that he was an excellent, respectful worker and that she would be willing to rehire him in the future. This witness, unlike the appellant's family, was relatively unbiased. Furthermore, she worked with the appellant regularly at the time he committed the crime.

In light of the above character evidence, we hold that any error in the exclusion of the proffered testimony from prison guards and a psychiatrist was harmless beyond a reasonable doubt.

The appellant finally contends that the trial court improperly refused to charge the jury not to speculate as to whether a life or death sentence would deter similar crimes. The trial court correctly refused the charge. "[T]he sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and characteristics of the individual defendant." State v. Plath, 313 S. E. 2d 619 (S. C. 1984).

PROPORTIONALITY REVIEW

We have examined the other cases in this State in which the death penalty has been imposed pursuant to Code §16-3-25(C)(3). We conclude that, in light of the nature of the crime and the appellant's character, the sentence must be affirmed. (See cases collected in State v. Koon, Op. No. 22075, filed April 3, 1984). The appellant shot the victim in cold blood for pecuniary gain. The victim's autopsy revealed 30 to 40 pellet wounds to the head in addition to the one by two inch hole.

We have combed the record in favorem vitae and find no reversible error.

The convictions and sentences are, accordingly,

AFFIRMED.

LITTLEJOHN, C.J., NESS, GREGORY and CHANDLER, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable Robert L. McFadden, Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WARDELL PATTERSON, JR.

APPELLANT.

PETITION FOR REHEARING

The appellant Wardell Patterson, Jr. requests rehearing of his appeal of his convictions for murder and armed robbery and sentence of death, which convictions and sentence were affirmed by this Court in Opinion No. 22168, filed October 10, 1984. In support of this request for rehearing, appellant submits that

(1) in ruling that the erroneously-excluded evidence of appellant's good behavior in prison would have been merely cumulative to other evidence of good character, the Court may have overlooked or misapprehended the following:

(a) Appellant's former employer, the one "relatively unbiased"

character witness whose testimony was admitted at the sentencing hearing, stated that she knew appellant only for about five-and-a-half months during 1980, and that she really didn't know anything about him except at work. Tr. 1226, line 8 to 1227, line 3. This point was stressed by the solicitor in his jury argument. Tr. 1254, lines 7-10.

(b) The evidence of appellant's good behavior in prison for the two-and-a-half years prior to his trial bore not only on his character, but on his record. Lockett v. Ohio, 438 U.S. 586 (1978). No other mitigating evidence concerning appellant's record during the nearly three years since the crime was considered by the trial jury.

(c) The Court's analysis does not reflect compliance with the constitutionally-required standard for assessing the effect of constitutional error on the validity of a conviction or sentence. Chapman v. California, 386 U.S. 18 (1967).

(2) In addition, appellant submits that in its review of the record in this case, the Court may have overlooked those portions of the sentencing phase jury argument of the solicitor which expressly invited the jury to weigh the character of the murder victim against that of appellant, and thereby injected an arbitrary factor into the determination of appellant's sentence in violation of S.C. Code §16-325(C)(1) and the Eighth Amendment. Moore v. Zant, 722 F.2d 640 (11th Cir. 1983) (rehearing en banc granted March 15, 1984). Tr. 1254, line 25 to 1255, lines 17.

For the foregoing reasons, appellant Wardell Patterson, Jr. requests that a rehearing of his appeal be granted.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
Attorney for Appellant

October 19, 1984.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable Robert L. McFadden, Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WARDELL PATTERSON, JR.

APPELLANT.

CERTIFICATE OF MERIT

I, William S. McAninch, hereby certify:

1) that I am an attorney duly licensed to practice in the courts of South Carolina;

2) that I am not concerned with the case of State v. Wardell Patterson, Jr.;

3) that I have read the appellant's petition for rehearing and the relevant portions of the record on appeal; and

4) that in my opinion, the petition for rehearing has merit.

William S. McAninch

WILLIAM S. MCANINCH

October 15, 1984.

The Supreme Court of South Carolina

October 30, 1984

David I. Bruck, Esquire
1711 Pickens Street
Columbia, South Carolina 29201

Re: The State v. Wardell Patterson, Jr.

Dear Mr. Bruck:

The Court has denied your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing Denied.

s/ Bruce Littlejohn	C.J.
s/ J. B. Ness	A.J.
s/ George T. Gregory, Jr.	A.J.
s/ David W. Harwell	A.J.
s/ A. Lee Chandler	A.J.

October 30, 1984."

Enclosed is certified copy of Order granting your Petition for Stay of Execution for a period of sixty (60) days from the date of the Order.

Sincerely yours,

CLERK

CND,Jr./Srj

Enclosure

cc: Sam B. Powell, Jr., Esquire
William Isaac Diggs, Esquire
The Honorable Harold M. Coombs, Jr.
The Honorable William L. Ferguson

The Supreme Court of South Carolina

The State, Respondent,

v.

Wardell Patterson, Jr., Appellant.

ORDER

Petition for Stay of Execution filed in the above matter is granted for a period of sixty (60) days from the date of this Order pending filing of Petition for Writ of Certiorari in the United States Supreme Court.

IT IS SO ORDERED.

FOR THE COURT C.J.

Columbia, South Carolina

October 29, 1984

CERTIFIED TRUE COPY:

Clerk, S C Supreme Court

OPPOSITION BRIEF

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-5843

WARDELL PATTERSON, JR., Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPY IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 19th DAY OF December, 19 84.
Harold M. Coombs, Jr.
ATTORNEY FOR Respondent
SWORN TO BEFORE ME THIS 19th DAY OF December, 19 84
Dawn Y. Newton
Notary Public for South Carolina
My Commission Expires: 9-17-85

(10)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

WARDELL PATTERSON, JR., Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

QUESTIONS PRESENTED

I.

Since the Court has already resolved the issue and the correct rule has been applied by the South Carolina Supreme Court, should the Court now grant the writ to affirm that the sentencer in a capital case should be permitted to consider in mitigation evidence of the defendant's character, record, and circumstances of the offense proffered as a basis for a sentence less than death?

II.

Where the South Carolina Supreme Court has followed this Court's precedent, recognized applicable constitutional principles, and held that evidence tending to show Appellant's character would have been admissible at trial, should the Court grant the writ to second guess the South Carolina Supreme Court's view of the evidence and redetermine whether any error in the exclusion of the proffered testimony was harmless beyond a reasonable doubt?

INDEX

CASES INVOLVED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

WARDELL PATTERSON, JR., Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 22168, filed October 10, 1984, as reproduced in Petitioner's Appendix at pages A-12 through A-17.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Since the Court has already resolved the issue and the correct rule has been applied by the South Carolina Supreme Court, should the Court now grant the writ to affirm that the sentencer in a capital case should be permitted to consider in mitigation evidence of the defendant's

character, record, and circumstances of the offense proffered as a basis for a sentence less than death?

II.

Where the South Carolina Supreme Court has followed this Court's precedent, recognized applicable constitutional principles, and held that evidence tending to show Appellant's character would have been admissible at trial, should the Court grant the writ to second guess the South Carolina Supreme Court's view of the evidence and redetermine whether any error in the exclusion of the proffered testimony was harmless beyond a reasonable doubt?

ARGUMENT

I.

Pursuant to the Court's constitutional interpretation and precedent, the South Carolina Supreme Court requires that the sentencer in a capital case consider any mitigating proffer of a defendant's character or record and any circumstances of the offense.

Insofar as Petitioner urges that testimony of his potential (future) adjustment to prison life was erroneously excluded at trial, his position is without authority. There is no "logical connection between adaptability to confinement and the specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue." While a jury needs to know any mitigating evidence of a defendant's character or record and circumstances of the offense, a defendant's potential

adjustment to prison life is simply irrelevant. State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984); State v. Koon, Op. No. 22075, South Carolina Surpeme Court, April 3, 1984. Petitioner does not show, and cannot show, that his alleged potential for adaptability to prison life exhibits either personal characteristics or circumstances of the offense which are relevant to his punishment. Also, at the time of trial Petitioner maintained that the issue of his adaptability to prison life was controlled (against him) by State law. (Tr. p. 1140, lines 2-15).

The South Carolina Supreme Court has consistently applied the principles of Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, 990 (1978) in recognizing that the Eighth and Fourteenth Amendments require that the sentencer in a capital case consider any mitigating proffer of a defendant's character or record and any circumstances of the offense. State v. Koon, Op. No. 22075, South Carolina Supreme Court, April 3, 1984; State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982); State v. Hyman, 276 S.C. 559, 281 S.E.2d 209, 214-215 (1981); State v. Linder, 276 S.C. 304, 278 S.E.2d 335, 339 (1981).

In the present case, the South Carolina Supreme Court found that the proffered mitigating testimony of Petitioner's good conduct in prison "would have included past behavior and would have therefore been admissible to show the appellant's character." State v. Patterson, Op. No. 22168, South Carolina Supreme Court, filed October 10, 1984.

(Petitioner's Appendix pages 15-16). The South Carolina Supreme Court has already ruled in accordance with the law pronounced by the Court leaving no issue for the Court's resolution.

II.

Where the South Carolina Supreme Court has applied the correct law in determining that Appellant's proffer of good conduct in prison would have been admissible to show good character and that the exclusion of such was harmless beyond a reasonable doubt, the Court has no issue of law to resolve.

The South Carolina Supreme Court has consistently applied the principles of Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, 990 (1978) in recognizing that the Eighth and Fourteenth Amendments require that the sentencer in a capital case consider any mitigating proffer of a defendant's character or record and any circumstances of the offense. State v. Koon, Op. No. 22075, South Carolina Supreme Court, April 3, 1984; State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982); State v. Hyman, 276 S.C. 559, 281 S.E.2d 209, 214-215 (1981); State v. Linder, 276 S.C. 304, 278 S.E.2d 335, 339 (1981). The state court ruled that the proffered testimony of Petitioner's good conduct in prison was admissible to show Petitioner's character. However, the state court found that the excluded testimony was cumulative to six (6) other witnesses who offered testimony of Petitioner's good character. Under

State law, cumulative evidence is additional evidence of the same kind to the same point. State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (1968). These other witnesses included Petitioner's father, Petitioner's sister, the mother of a childhood friend, the family's minister, the Petitioner's grandfather who directed a corporation which wanted to employ Petitioner, and Petitioner's employer at the time of the murder. (Petitioner's Appendix page A-16).

In light of the cumulative character evidence the South Carolina Supreme Court held that "any error in the exclusion of the proffered testimony from prison guards and a psychiatrist was harmless beyond a reasonable doubt." (Petitioner's Appendix page A-16).

Constitutional error can be held to be harmless where it is found that it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Based upon the present record, it is inescapable that: (1) The South Carolina Supreme Court found the error in the exclusion of the evidence of Appellant's good conduct in prison was harmless. (2) The South Carolina Supreme Court applied the correct law in determining that the error was harmless. (3) The State court's determination is supported by the record.

There is then no issue of law for the Court to decide.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

December 19, 1984.

OPINION

SUPREME COURT OF THE UNITED STATES

WARDELL PATTERSON, JR., PETITIONER
84-5843 v.
SOUTH CAROLINA

PAUL F. KOON, PETITIONER
84-5850 v.
SOUTH CAROLINA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Nos. 84-5843 AND 84-5850. Decided April 15, 1985

The petitions for writs of certiorari are denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In spite of this Court's repeated declarations that a capital "'sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character . . . that the defendant proffers as a basis for a sentence less than death,'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978)), the South Carolina Supreme Court has determined that evidence of a capital defendant's likely non-dangerousness within a prison environment is legally irrelevant to the capital sentencer's choice between death or life in prison. In these cases, the petitioners were sentenced to death. They had offered such evidence in mitigation of death but were denied the opportunity of submitting the evidence to their sentencing juries.

The death sentences in these cases were imposed in glaring violation of two lines of this Court's capital sentencing jurisprudence. First, and most obviously, the sentences are contrary to the *Lockett-Eddings* line of authority, which makes unmistakably clear that it is for the sentencer to determine the weight to be given to proffered evidence of mitigation. Second, they are equally in conflict with those decisions of

this Court that make equally clear that the question of a capital defendant's future dangerousness is a legitimate penological concern relevant to a capital sentencing hearing. See *California* v. *Ramos*, 463 U. S. 992, 1001–1003 (1983); *Barefoot* v. *Estelle*, 463 U. S. 880, 896–905 (1983); *Jurek* v. *Texas*, 428 U. S. 262, 274–276 (1976).

While this latter group of cases affirmed the penological relevance of future dangerousness in contexts in which the state urged it as a factor in aggravation, the hitherto relevant factor of future dangerousness cannot become suddenly and cruelly "irrelevant" as a matter of law when a defendant wishes to assert its absence as a factor in mitigation. As was declared in a precursor to *Lockett* and *Eddings*, "a jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, *supra*, at 271. Rather than allow *Lockett* and *Eddings* to be eroded through such a cruelly inequitable view of relevance, I would grant these petitions.[1]

I

At the time of the sentencing hearings in question the South Carolina Supreme Court's view of the relevance of predictive evidence as to a defendant's future non-dangerousness in a prison environment was clear:

[1] I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not take this view, I would grant review in these cases because of the important issue raised concerning the proper interpretation of *Lockett* and *Eddings*.

Unfortunately, this case is illustrative of a disturbing trend in a number of state courts to read our holdings in *Eddings* and *Lockett* in an unjustifiably narrow manner, and to declare, in spite of these holdings, that an increasing number of proffered bases of mitigation are simply irrelevant. See *Boyd* v. *North Carolina*, *ante*, p. —— (MARSHALL, J., dissenting from the denial of certiorari); *post*, p. —— (MARSHALL, J., dissenting from the denial of certiorari).

> "The penalty phase of a capital murder case is concerned with the existence or nonexistence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. . . . In *Lockett* v. *Ohio*, . . . cited as controlling in *Eddings* v. *Oklahoma*, . . . the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant." *State* v. *Koon* (hereinafter *Koon I*), 289 S. C. 528, 536, 537, 298 S. E. 2d 769, 773–774 (1982).[2]

At Koon's hearing below, his counsel sought to develop a number of avenues of mitigating evidence. First, he sought to call two prison officials to testify as to petitioner's excellent record in prison and his demonstrated ability to adapt to prison life. Record in No. 84–5950, pp. 922–927. Second, he sought to call psychiatric experts to testify as to Koon's mental condition. Those psychiatrists had examined him and were prepared to testify that he suffered from a severe mental disorder, and that partly as a result of that disorder he was extremely capable of adapting to prison life. They would have testified that, within the highly structured and regulated context of life in prison, Koon would be unlikely to

[2] This ruling by the South Carolina Supreme Court occurred in an appeal of an earlier sentencing of petitioner Koon. In both of these cases the capital defendants had previously been sentenced to death pursuant to proceedings that were later found by the South Carolina Supreme Court to violate state law. *State* v. *Patterson*, 278 S. C. 319, 296 S. E. 2d 264 (1982); *State* v. *Koon*, 278 S. C. 528, 298 S. E. 2d 769 (1982) (hereinafter *Koon I*). Both had thus been imprisoned for a substantial period at the time of their resentencing hearings.

present any problem of future dangerousness, indeed, he might live a more productive life than he was capable of living outside of confinement. *Id.*, at 925–928. See also *Id.*, at 1062–1066.[3]

The trial court, relying on *Koon I*, excluded all of the prison officers' testimony, and all psychiatric evidence of

[3] At the sentencing hearing at issue in the instant case, Koon made a proffer that his psychiatric expert would testify to substantially the same effect as the expert had done in the hearing that resulted in *Koon I*, *supra*. The following testimony by Dr. Pattison, an expert psychiatric witness, was proffered in mitigation at that earlier hearing:

"Q: You have observed Paul in his prison environment—his jail environment. Do you have an opinion as to his ability to adapt to a long term institutional environment?

"A: Yes. Both from the records and from observing him in the jail and talking with him it is, I think, quite clear in my professional opinion that he adapts very well to an institutional environment. As a matter of fact, in my professional judgment, in an institutional environment he has performed at probably his highest levels of function during his adult life, in as much as that environment is supportive, protective and has a relatively low level of stress compared to life in the outside world. Therefore, in this case I would be willing to risk a professional prediction in that I would predict that he would make an overall excellent institutional adjustment on a long term basis . . . .

"Q: Do you think Paul would be a violent person in an institutionalized environment?

"A: Again, in my professional opinion I feel confident in a reasonable frame to conclude that he would not be violent or dangerous within a custodial institution. The basis for my opinion is his past record within the custodial environment, his ability to conform within that environment, not only to maximum seclusion, but also conforming to the rules and regulations when he was under minimal supervision. Furthermore, his past history and his present state suggests that he performs interpersonally much better with men. That his major provocations of explosive and assaultive behavior is with women rather than with men. Therefore, I conclude that he would be a very good risk for good adjustment in an institution and a very low risk for assaultive or violent behavior in an institutional setting.

"Q: He could be, in your opinion, could he be a contributive [sic] member to a prison institution?

"A: Again, for the same reasons, I would say yes, in my professional opinion." Pet. for Cert. in No. 84–5850, at pp. 6–7.

Koon's ability to adapt to prison life or of his likely future non-dangerousness within the prison environment. Although Koon was allowed to call a psychiatric witness to testify about his general psychiatric makeup, questions concerning adaptability or future non-dangerousness were prohibited. The witness did briefly refer to petitioner's successful adaptation to prison life in responding to a question only tangentially related to that issue, petitioner's counsel was obviously unable to either develop this issue to any extent or to draw the jury's attention to it in his summation.

In *Patterson*, the facts are quite similar. Petitioner proffered evidence from prison authorities that he had an exemplary prison record during the period of almost three years since his earlier trial, and proffered evidence from a psychiatrist that individuals exhibiting a personality pattern similar to petitioner's "usually make a satisfactory adjustment to prison life" so that the likelihood of future violence by such persons "diminishes with the passing of time." Record in 83–5843, p. 1442. The trial court excluded all this evidence as irrelevant under the authority of *Koon I*. Thus, the sentencing jury was given no opportunity at all to consider either petitioner's behavior in prison or the issue of petitioner's likely future non-dangerousness within a prison environment.

On appeal, both of these petitioners' death sentences were affirmed by the State Supreme Court on a slight variation of the *Koon I* rationale. Following *Koon I*, the Court held that all predictive evidence of Patterson's future behavior in prison was simply irrelevant. It modified *Koon I* only to the extent that it held that the bare facts of a Patterson's past prison record would now be considered admissible as general personal history. It read *Lockett* and *Eddings* as saying that a defendant's "character" was relevant mitigating evidence that can be shown through evidence of past behavior. It thus found that it had been error under for the trial court to exclude the prison officers' testimony concerning Patter-

son's prior prison behavior. But since such behavior was relevant only to show a generally good character, the Court held that it was merely cumulative of other general character evidence submitted by the petitioner.[4]

Similarly, in Koon's appeal below, the State Supreme Court held that the evidence of future non-dangerousness was properly excluded. Prison officials' testimony as to Koon's prison record was relevant, but again, was properly excluded as cumulative since the psychiatrist had briefly, in an unresponsive answer, stated that petitioner had been doing quite well in prison.

In both of these cases, the capital defendants were limited to argue the most vague and general theories of mitigation. Their chosen theories were completely excluded from the jury's consideration. The State Supreme Court declared that it was irrelevant, as a matter of law, to argue that a death sentence might be inappropriate where a defendant could be relied on to lead an unthreatening life, and even a somewhat productive life, if kept in prison.[5]

II

The constitutionality of these sentences rests on the premise that a state can make irrelevant to the capital sen-

[4]The character evidence that the Court found was cumulative to Patterson's evidence of his prison record was the testimony of a former employer that Patterson was a good and responsible worker and general testimony by Patterson's relatives to the effect that he had been a good child and was still a "wonderful person" who had been led by bad influences to commit a murder that was out of character for him.

[5]The fact that in both of these cases the state court held that the profferred evidence of prior prison behavior was "cumulative" cannot save either of these decisions from review. In both cases, the theory of future non-dangerousness was deemed irrelevant and the evidence and argument which would have been necessary to its proof was excluded. The determinations of "cumulativeness" whatever their merits, cf. *Chapman* v. *California*, 386 U. S. 18 (1967), were determinations that rested on the predicate federal determination that the only basis for the relevance of the evidence was to show general good character.

tencing process, as a matter of law, the theory of future non-dangerousness that was proffered in mitigation by petitioners. The state's reasoning was that the proffered factor does not "aris[e] out of the murder" nor "bear logical relevance to the crime." *Koon I*, 298 S. E. 2d, at 774. Put another way, the State viewed the factor as irrelevant because its proof would not reduce the moral culpability of the defendant. But this Court has never limited the circumstances relevant to a capital sentencing determination to those going to moral culpability. Quite the contrary, this Court has repeatedly treated predictive evidence relating to future dangerousness as highly relevant to sentencing concerns.

The most glaring is *Jurek* v. *Texas*, where this Court upheld a state law requiring capital sentencing juries to consider the issue of future dangerousness. The Court there declared:

> "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . *And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.* . . . The task that a [capital sentencing] jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. *What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.*" 428 U. S., at 274–276 (emphasis added).

The Court has treated evidence of future dangerousness as relevant even where the evidence at issue seemed of much less predictive value than the evidence at issue here. In

both the instant cases, the witnesses who were excluded had all had extensive contact with the defendants and were testifying only to the likely behavior of the defendants within the same environment as that in which they had made their observations. In contrast, in *Barefoot* v. *Estelle*, 463 U. S. 880 (1983), this Court approved of the relevance of expert psychiatric predictions of future dangerousness even where the expert witness was testifying based on hypotheticals without ever having examined the defendant. *Id.*, at 903–906. If that evidence was relevant to capital sentencing, how can the evidence at issue in the instant case be deemed irrelevant? See also *California* v. *Ramos*, 463 U. S. 992 (1983).

III

Of course there are two differences between these earlier cases and the instant cases. First, relevance in the earlier cases was urged on the sentencers by prosecutors, who called for death sentences on the theory that the defendants at issue might be violent in the future. Here, evidence of the absence of future dangerousness is offered as a reason for urging that the defendants not be sent to die. But this difference can hardly be a relevant one. A system of punishment would certainly be fundamentally unfair if it accepted the validity of a call for death where a factor was present, but declared that that factor's absence could not be offered as a reason for life. Such situation cannot be tolerated by the Eighth Amendment.

The second difference is that discussions of future dangerousness in our prior cases have emphasized the defendant's dangerousness to the society outside of jail, while here, the emphasis was on the likely non-dangerousness of the defendants' future behavior within jail. But although this might be viewed as an important distinction by a sentencer, it cannot be rationally viewed as a distinction that makes non-dangerousness in prison irrelevant as a matter of law. If a jury can base a sentencing determination on predictions of the possible dangerousness of a defendant at the point far in the future when, after a long confinement, he might be paroled or pardoned, a jury cannot be precluded from considering the more immediate issue of his future dangerousness during that quite lengthy period when he will remain in jail. Similarly, it would be the ultimate cynicism to adopt a conclusive presumption that a sentencing jury would simply be wholly uninterested in the possible dangers that a killer who continues to be violent might present to other inmates—or conversely—that the jury would be wholly unimpressed by the fact that a different criminal might present no dangers to those inmates.

Ultimately, the evidence offerred in mitigation here was premised on the proper notion that a jury might confront in a serious and humane way the question of what is actually to be gained and lost by a verdict of death. While in some cases the cry for moral retribution may sound clear to the jury, in others it may not. In the latter cases, it may be quite effective, as it would always be legitimate, to remind the jury that an execution may generate little social benefit and, indeed, may generate substantial social loss. A jury may come to see that a prisoner's life in prison has some substantial social worth. He may adapt to his environment, find some degree of community in it, and contribute in some way to that community. He may even come to live a life of greater meaning than that which he knew before his confinement. Should a sentencer believe that there is a chance that these may be the consequences of a rejection of a death sentence, these factors may become powerful factors of mitigation. South Carolina's determination that they are simply irrelevant cannot stand.